

**REMARKS/DISCUSSION:**

This Amendment B is being filed within three months after the shortened statutory period for response that ended on October 7, 2006. Accordingly, a Petition for a Three-Month Extension of Time is made a part of the transmittal letter filed herewith. Further, this Amendment B is in response to a Final Action and, therefore, an RCE is filed concurrently herewith.

By this Amendment B, claims 1-4 and 6-10 are pending in this application. Claims 5 and 11 have been canceled and Claims 1 and 6 have been amended. Support for the amendments to claim 1 is given at paragraphs 00160 through 166.

For completeness, Applicants have now included the text of claims 12-15, which were inadvertently omitted from the prior Amendment A response. Claims 12-15 were withdrawn in a previous response to a restriction requirement.

Applicant has carefully studied the outstanding Office Action. This Amendment is intended to be fully responsive to all points of rejection raised by the Examiner and is believed to place the application in condition for allowance. Favorable reconsideration and allowance of the application are respectfully requested.

Rejection under 35 U.S.C. § 102(e)

Claims 1-11 stand rejected as being anticipated by Menzel et al (US Publication No. 2003/0078515) as previously noted.

Applicant respectfully transverses the Examiner's rejection of Claims 1-11 and 26 over Menzel because, according to Applicants' understanding, the Menzel reference neither teaches nor suggests the elements of the Applicants' invention. It is Applicant's understanding that a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or

inherently described, in a single prior art reference. See for example MPEP 2131.

Under MPEP 2131, a claim is anticipated only if each and every element as set forth in the claim is found, either expressly or inherently described, in a single prior art reference. The identical invention must be shown in as complete detail as is contained in the claim, and the elements must be arranged as required by the claim. Under this standard, Applicant submits that Menzel fails to anticipate claims 1-4 and 6-10.

Applicants respectfully disagree with the Examiner's assertion that Menzel discloses a system for obtaining an audio baseline of a patient for the purpose of representing the level of consciousness of a patient. Rather, Menzel discloses apparatus and methods for calibrating an audio resource (e.g. home computer, mobile phone) and to apply the calibration to measure hearing loss of the patient. It seems that the Examiner is participating in an exercise of fitting a square peg into a round hole and extrapolating what Menzel actually stands for. Nowhere does Menzel disclose or suggest, either explicitly or inherently, calibrating a system to a baseline audio stimulus representing a level of patient consciousness, notwithstanding the Examiner's attempt at word games.

In an attempt, however, to move the prosecution forward, claims 1 and 6 have been amended to recite that "the baseline stimulus [is] for monitoring the patient's level of sedation" (claim 1); and "the sub-controller utilizes the baseline as the initial stimulus level in assessing the level of sedation of the patient" (claim 6).

In addition, Applicants respectfully submit that Menzel neither discloses nor suggests the claimed invention as is required under MPEP 2131. Menzel teaches a user of the device to make a calibration sound using an item likely to be available to the user, other than the audio resources on the device. (¶0015). Applicants neither disclose nor claim a patient generating a calibration sound; rather, Applicants disclose and claim a request assembly which communicates

to the patient an audio request to which the patient responds. A baseline audio stimulus is then recorded by the request assembly. Menzel does not disclose or suggest a request assembly which communicates an audio request to the patient to which the patient responds for the purpose of the request assembly to record a baseline audio stimulus. Reconsideration is requested.

While Applicants have noted several distinctions over the art of record, Applicants note that several other distinctions exist, and Applicants preserve all rights and arguments with respect to such distinctions.

### **Conclusion**

Applicant submits that in view of the discussion, the rejections under 35 U.S.C. §§ 102(e) have been overcome and that the invention is now patentable over the cited prior. The Examiner is respectfully requested to reconsider all rejections and pass this case to issue.

Should any minor points remain prior to issuance of a Notice of Allowance, the Examiner is requested to telephone the undersigned at the below-listed telephone number.

The Commissioner is hereby authorized to charge any additional fees, which may be required to Account No. 10-0750/END-5034/VEK.

Respectfully submitted,

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